

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-1310

To be argued by
JOSEPH I. STONE...

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

76-1310

UNITED STATES OF AMERICA,
Appellee.

-v-

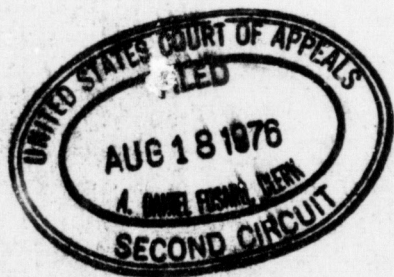
JAMES EDWARD NELSON,
Defendant-Appellant.

B.
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

+ Appellant
BRIEF FOR DEFENDANT-APPELLANT

JAMES EDWARD NELSON



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
 Appellee, :
 -v- :

JAMES EDWARD NELSON, :
 Defendant-Appellant. :
-----X

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Defendant-appellant James Edward Nelson appeals from a judgment of the United States District Court, Southern District of New York, convicting him after a plea of guilty pursuant to stipulation and said judgment being entered before Hon. Lawrence W. Pierce, U.S.D.J., convicting the defendant of armed bank robbery, Title 18, Section 2113(d). The defendant was sentenced to fifteen years imprisonment by Judge Pierce on June 21, 1976, and was remanded. Bail was neither sought nor granted. The undersigned represented the defendant pursuant to an assignment under the Criminal Justice Act and this assignment was continued pursuant to order of the Court dated July 12, 1976.

Prior to trial, the defendant sought relief as to certain evidentiary items which the government had intended to offer in the event that a trial took place. Defendant claimed his arrest was invalid and in violation of Rule 41 of the

Federal Rules of Criminal Procedure and that statements elicited from him after his arrest were contrary to his Fourth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436.

Judge Pierce conducted an evidentiary hearing concerning the defendant's claims, on May 11, 1976, and shortly thereafter denied the defendant's motions, "in all respects." Pursuant to an agreement entered into with the United States Attorney, with the consent of Judge Pierce, the defendant pleaded guilty to one count of the indictment reserving for appellate purposes a challenge to Judge Pierce's rulings denying him relief from the statements made and the physical evidence seized.

STATEMENT OF FACTS

The defendant Nelson was arrested in the mid-morning of March 8, 1976, by New York City Police Officers within a few hours after the First National City Bank at 700 Columbus Avenue, New York, New York, was robbed by two individuals, one of whom was reported to have had a gun. The undisputed testimony indicates that an off-duty patrolman (Officer Carr) was outside the area of the First National City Bank at about 9:15 in the morning and that prior to the robbery he had observed two males and shortly after the robbery, he followed

one of the individuals and arrested him in a garage after removing a loaded weapon which he claimed he saw in co-defendant Harvey's hand.

After Harvey was arrested he was taken to the local precinct where he not only gave a statement incriminating himself but gave the officers a detailed analysis of who his confederates were and where the alleged proceeds of the robbery were. According to Police Officer Stein, he was informed that the defendant Nelson was in Room 909 of the Whitehall Hotel and shortly after 11:00 A.M. that morning, he proceeded to the Whitehall Hotel. According to Officer Stein, he directed Special F.B.I. Agent Joseph DiBona and Joseph Martin Aldrich to proceed to the ninth floor, although he admitted that he did not know whether or not Nelson was actually in the room at that time (36R). Prior to going to the hotel, they did not check to see if Nelson had registered there or whether there was a phone listed to Nelson or whether he had a description in the Bureau of Criminal Identification, (38, 39R). The main basis for the agents and officers going to arrest Nelson in Room 909 of the Whitehall Hotel was information supplied by Harvey, a previously arrested co-defendant who was not an informer or had never before given information.

No warrant was obtained nor did the officers attempt to seal the room while one of them went downtown to a magistrate and obtain a warrant (41R).

The special circumstances concerning the failure to get a warrant were stated by Agent DiBona, who claimed, "We were told that we better get moving or we could possibly miss him," (45, 46R). When he arrived at the hotel, Agent DiBona went immediately to Room 909 while other agents and/or officers made inquiries and when he got to the door, he heard voices and activity. Then he claimed that the door of the apartment flew open and he saw two men running out of the apartment.

According to DiBona, one of the individuals fit the description. He identified himself by saying, "F.B.I.", and both individuals immediately turned and ran into the apartment (47R).

After the individuals went back into the apartment, DiBona kicked on the door and it flew open. He saw Nelson attempting to climb out of the window, at which time he ordered him to freeze. According to Agent DiBona, he gave him his full rights and Nelson nodded that he understood (48R). Immediately after the arrest, DiBona observed an open suitcase five to ten feet from the doorway containing trousers and large bundles of money and three feet from the

suitcase was a blue trench coat. DiBona had previously received information that clothing fitting the description had been in the bank robbery (48,49R). In the trench coat he found a nylon stocking mask and Nelson's personal identification (50R). Approximately two hours later, he had a conversation with Nelson and claimed that he read him the entire form concerning his rights and that Nelson signed the form (60R). The next day there were additional questions asked of Nelson at which time he stated that he did not want to answer any more questions and wanted to talk to a lawyer (61R). Even after he made that statement, DiBona gave Nelson his confession and Nelson signed it. The defendants were not arraigned until approximately 2:00 P.M. on March 9, 1976, and according to the government, this was an ordinary delay in processing.

DiBona admitted on cross examination that he had never seen Harvey prior to March 8th, had never received information from him and did not confirm any of the information that he received from the police officers before he went to the Whitehall Hotel (74R). He further stated that he never even checked with his own office to see whether Nelson was on the suspect list for bank robbers (75R). He was ambivalent on a key question, namely, did he intend to arrest the occupant

of Room 909 when he got off the elevator. He admitted (76R) that when he knocked on the door and someone fit who he was looking for, he would arrest him. The only exception he seemed to make was that if two women were in Room 909, they would not fit who he was looking for. The Whitehall Hotel being in a predominantly black neighborhood would then leave any black man in Room 909 subject to arrest without any judicial restraints. Cross examination attempted to elicit what Agent DiBona's thoughts and/or intentions were when he got off the elevator. The United States Attorney objected and he was sustained. It is the defendant's position that the intentions of the agent and his thoughts form the basis for probable cause and a curtailment of cross examination in this matter was error (76R).

When Nelson exited the room, DiBona characterized him as running and said, "F.B.I. Freeze." Since the apparent showing of authority was clearly made at this time and a shotgun was in DiBona's hands, we must assume, as a matter of law, that the arrest took place at this time. DiBona admitted that the door was not opened voluntarily by either defendant and that he had no warrant when he entered the room and did not check with Stein concerning any information Stein had obtained from the clerk downstairs (81R).

The government's next crucial witness concerning Nelson was Agent Edward T. Walker, who testified fully and completely that he advised Mr. Nelson of his rights on March 8, 1976, at approximately 3:00 P.M. and that after advising Mr. Nelson of his rights, Nelson signed the advice-of-rights in his presence and he (Nelson) stated he would like to think the matter over before he would answer any questions (89,90R). Shortly thereafter, Nelson gave a complete statement. After Agent Walker took the statement, he became aware that Nelson used heroin. However, Agent Walker did not think it important enough to ask him whether the use of heroin affected his memory or whether he felt ill (96R). Agent Walker admitted that he was advised by the arresting agents when Nelson was transported to the 24th Precinct that he did not wish to make a statement (97R). The Court refused to allow counsel to elaborate on the above issue.

QUESTIONS PRESENTED

1. WAS THE ARREST OF NELSON LEGAL AND THE SUBSEQUENT SEARCH VALID?
2. WERE THE STATEMENTS PROPERLY OBTAINED?

ARGUMENT

POINT I

Governmental intrusion into the privacy of the home is, with limited exceptions, prohibited by Constitutional limitations in the absence of a valid search warrant, U.S. Constitution, Fourth Amendment and as set forth in *Silverman v. U.S.*, 365 U.S. 505 and *Jones v. U.S.*, 357 U.S. 493.

Reasonable cause or probable cause to make an arrest but not a search has been held to be an exception to the obtaining of a search warrant. The presence or absence of reasonable cause depends on whether the officer in good faith believed that the defendant was guilty of a felony or whether this belief rested on grounds which would induce an ordinary, prudent and cautious man under the circumstances to believe likewise, *Brinegar v. U.S.*, 338 U.S. 160.

A reasonable belief can come from a reliable informer or from information which has been proven reliable by the cautious checking of the officers. None of the circumstances were present in this case. It was clear that Harvey was not a reliable informer and that none of the agents had tried to confirm any of his information. Since *Brinegar* (supra) claims that an officer's good faith allows for an exception to a search warrant, then counsel for the defendant should have been permitted to inquire as to the officer's thoughts to

ascertain whether or not he really had good faith. Judge Pierce's sustaining of the government's objection precluded a proper inquiry into this issue.

The agent had an obligation to announce his authority and presence before he kicked in the door. 18 U.S.C., Section 3109, mandates this as does *Sabbath v. U.S.*, 391 U.S. 585. The mere stating, "F.B.I. Freeze" is not in compliance with 18 U.S.C. Section 3109. It seems that after the agents obtained entry into Nelson's room, the contraband, i.e., the money, and clothing which was used in the robbery came into open view. *Coolidge v. New Hampshire*, 403 U.S. 443, discusses the "plain view doctrine". However, the original entry into a defendant's premises must be in conformity with Constitutional standards and if the entry is illegal then the "plain view doctrine" cannot be argued, *McDonald v. U.S.*, 335 U.S. 451. The "emergency" or the time period that the government urged upon the District Court is not applicable in this situation. The government could have sealed the apartment, could have prevented any person from leaving and if they could have convinced a magistrate that Harvey's statements alone provided substantial basis for a search warrant then a search warrant could have been obtained. We must bear in mind that this arrest took place sometime after twelve noon at approximately 96th Street and Columbus

Avenue in Manhattan, fifteen minutes from the United States Courthouse by subway and perhaps a little longer by car. This was a weekday and the United States Magistrate is presumed to be on duty. The information that the agents had was obtained as early as 10:30 A.M. and yet no effort was made to obtain a warrant. As Mr. Justice Jackson observed in *Johnson v. U.S.*, 333 U.S. 10, "...When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or a government enforcement agent."

POINT II

Defendant's confessions were involuntary. *Clewis v. Texas*, 386 U.S. 707, set forth the Constitutional standard to be used in each case as to whether or not a defendant's will was overborne at the time he confessed, citing *Reck v. Pate*, 367 U.S. 433.

As in *Clewis*, we have a series of confessions, the last one being reaffirmed by the United States Attorney but if this Court will find that the first confession was a product of coercion, then the second and third confessions must fall. As Justice Frankfurter stated in *Culombe v. Connecticut*, 367 U.S. 568, "If his will has been overborne and his capacity for self-determination critically impaired,

the use of his confession offends due process." The issue before us is whether the agent had an absolute obligation to inquire as to whether or not heroin use affected his capacity for self-determination. If it did and after the defendant originally did not want to answer questions, then a cease and desist policy should have prevailed and none of the defendant's confessions should have been admitted into evidence.

CONCLUSION

THE WARRANTLESS SEARCH OF DEFENDANT'S APARTMENT SHOULD BE DECLARED ILLEGAL. THE SUBSEQUENT CONFESSION WAS INVOLUNTARY. THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

JOSEPH I. STONE
Attorney for Appellant
Office & P.O. Address
277 Broadway
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :

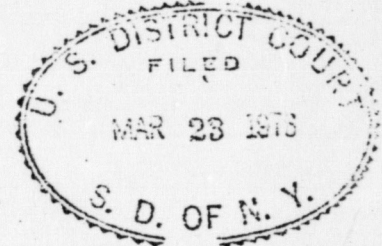
-v- :

DANIEL LOUIS HARVEY and :
JAMES EDWARD NELSON, :

DEFENDANTS. :

INDICTMENT

76 Cr.



-----x
COUNT ONE

The Grand Jury charges:

On or about the 8th day of March, 1976, in the Southern District of New York, DANIEL LOUIS HARVEY and JAMES EDWARD NELSON, the defendants, unlawfully, wilfully and knowingly, by force, violence, and intimidation, did take, from the person and presence of another, money and property in the approximate amount of \$24,297., which belonged to, and was in the care, custody, control, management, and possession of the First National City Bank, 700 Columbus Avenue, New York, New York, a bank the deposits of which were then and there insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Section 2113(a)
and Title 18, United States Code, Section 2.)

COUNT TWO

The Grand Jury further charges:

On or about the 8th day of March, 1976, in the Southern District of New York, DANIEL LOUIS HARVEY and JAMES EDWARD NELSON, the defendants, unlawfully wilfully and knowingly did assault and put in jeopardy the lives of various persons by the use of a dangerous weapon, to wit, a firearm, while committing the offense described in Count One of this indictment.

(Title 18, United States Code, Sections 2113(d) and 2.)

MAR 23 1976
MAR 23 1976

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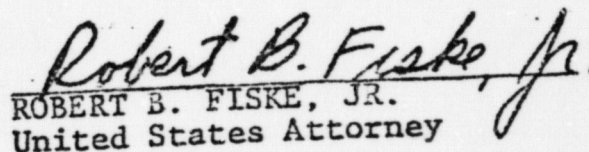
COUNT THREE

The Grand Jury further charges:

On or about the 8th day of March, 1976, in the Southern District of New York, DANIEL LOUIS HARVEY and JAMES EDWARD NELSON, the defendants, did use a firearm to commit a felony and did carry a firearm unlawfully during the commission of a felony for which they may be prosecuted in a court of the United States, namely, the offenses charged in Counts One and Two in this Indictment.

(Title 18, United States Code, Sections 924(c)(1) and (2), and 2.)


FOREMAN


ROBERT B. FISKE, JR.
United States Attorney

BEST COPY AVAILABLE

Case No. 0851	VS.	NELSON, JAMES EDWARD	Case Filed Date 03 23	76	0287	02
0208			JUVENILE	02		

U.S. TITLE-SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:2113 (a)	Bank robbery.	1
18:2113 (d)	Armed bank robbery.	2
18:924 (c)	Unlawful use of firearm.	3

U.S. MAG. CASE NO. 76-309	RELEASE
<input type="checkbox"/> Arr. <input type="checkbox"/> Fugitive <input type="checkbox"/> Det. <input type="checkbox"/> Pers. Recog. <input type="checkbox"/> Set <input type="checkbox"/> PSA \$35,000 <input type="checkbox"/> Date <input type="checkbox"/> 10% Deposit <input type="checkbox"/> Bad Debt Made <input type="checkbox"/> Surety Bond <input type="checkbox"/> Status Changed (Site Correct) <input type="checkbox"/> Collateral <input type="checkbox"/> Pity Case <input type="checkbox"/> Other	DISPOSITION OF CHARGE 6-21-76 <input type="checkbox"/> Convicted <input type="checkbox"/> On All Charges <input type="checkbox"/> Acquitted <input type="checkbox"/> On Lesser Offense <input type="checkbox"/> Dismissed <input type="checkbox"/> WOP <input type="checkbox"/> WP <input type="checkbox"/> On Government's Motion

H. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Began 3-8-76	High Risk Date 3-23-76	03-29-76	Trial Set For
Summons Served	Indict. Waived <input type="checkbox"/>	1st Plea 03-29-76	Voir Dire <input type="checkbox"/>
First Appearance	In Charging District	Final Plea	Trial Began <input type="checkbox"/>
	Superseding <input type="checkbox"/> Indictment <input type="checkbox"/>	<input checked="" type="checkbox"/> NG <input type="checkbox"/> G <input type="checkbox"/> NOL <input type="checkbox"/> G. Plea <input type="checkbox"/> W/Drawn <input type="checkbox"/> NG <input type="checkbox"/> G <input type="checkbox"/> NOL	Trial Ended <input type="checkbox"/>

MAGISTRATE		DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME
Search Warrant Issued	Return			PRELIMINARY EXAMINATION		<input type="checkbox"/> DISMISSED
Summons Issued	Served			OR		HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Arrest Warrant Issued				REMOVAL HEARING		HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
COMPLAINT				<input type="checkbox"/> WAIVED <input type="checkbox"/> NOT WAIVED <input type="checkbox"/> INTERVENING INDICTMENT		
OFFENSE in Complaint				Tape Number		

U.S. Attorney or Asst.

 Steven M. Schatz
 791-1917

ATTORNEYS

 Joseph I. Stone
 277 Bway, NYC 10007

 Defense ☒ CJA ☐ Ret. ☐ Waived ☐ Set. ☐ None / Other ☐ FD ☐ CD

* Show last names and suffix numbers of other defendants on same indictment/information.

DATE	PROCEEDINGS	EXCLUDABLE DELAY
3-23-76	Filed indictment.	
3-29-76	Deft. (Atty. present) pleads not guilty. Motion returnable in 10 days. Bail fixed by Magistrate continued in the amount of \$35,000 cash or surety, deft. continued remanded in lieu of bail. Case assigned to Judge Pierce.	
04-06-76	Filed the following papers rec'd from Mag. Schreiber. (Mag. #76-) Pocket Entry Sheet Criminal Complaint Financial Affdvt. CJA - 23 Copy 5 Appointing Joseph Stone -277 Bway, NYC 10007 as atty. for dft.	
04-06-76	Conference held - Both Dfts. & their attys present - AUSA present - Dftz. motion to reduce bail - denied - Suppression Hearing begins May 3, 1976. Trial May 24- Defts. continued remanded in lieu of bail.Pierce J.	
04-23-76	Filed Dfts. Notice of Motion for an order suppressing any & all statement, etc. & granting deft. severance from de ft. Harvey. Ret. 5-3-76.	

- 5-75 Filed Gov't Memorandum in law in opposition to dfts. motion to suppress.
- 5-11-75 Suppression Hearing begin - both dfts. present & their attys. Hearing concluded- Decision Reserved.....Pierce J.
- 5/13/75 Filed Memo. End. on motion dtd. 4/23/75. Motion to suppress & for a severance are in all respects denied....Pierce J. (mailed notice)
- 5-21-75 Dft. Nelson (Atty. Joseph Stone Present) withdraws his plea of Not Guilty & pleads Guilty to count 2. Only. P.S I. Ordered. Sentence June 21, 1976 @ 4:30 - Dft. Cont'd Remanded in lieu of bail.....Pierce J.
- 6-3-76 Filed transcript of record of proceedings dated 3-30-76
- 6-21-76 Filed JUDGMENT & COMMITMENT (atty present) The Deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS on count 2. Deft. is remanded. Counts One and Three are dismissed on motion of Deft's. counsel with the consent of Govt.....Pierce, J.
Issued commitment 6-24-76.
- 7-1-76 Filed Dfts. Notice of Appeal from Judgment dtd. 6-21-76. (mailed notice)

B

EXCERPTS FROM TESTIMONY

J O H N J. S T E I N, called as a witness by the government, being first duly sworn, testified as follows:

CROSS EXAMINATION

BY MR. STONE:
(36R)

A Special Agent Joseph DiBona and Joseph Martin Aldrich left me at the lobby entrance, and I directed them to go to the floor while I made inquiries at the desk.

Q You told them to go to the 9th floor and effectuate an arrest before you had a chance to talk to the hotel clerk?

A I directed them to go to the 9th floor to cover the door so that the suspect could not leave without our being aware of it if he was there.

Q You didn't know if he was there or not at the time you directed DiBona?

A That's correct.
(38R)

Q Prior to going to the hotel, the Whitehall Hotel, did you or any of the detectives call the Whitehall to see if James Nelson had registered there?

A No, sir.

Q Prior going to the Whitehall Hotel did you check with any telephone company to see if there was a phone listed to James Nelson at the Whitehall Hotel?

A No, sir.
(39R)

Q Prior to going to the Whitehall Hotel did you try to obtain a description from the Bureau of Criminal Identification as to a James Nelson?

A No, sir, I did not.
(41R)

Q And you could have sealed the front door and prevented anyone from leaving without any trouble?

MR. SCHATZ: Objection, your Honor.

THE COURT: I will allow it.

A There is also a window that exited onto a rooftop which was adjacent to the room.

Q Did you find out from the hotel manager or employee that you could have gone through another window to that window and secured it?

A No, sir, I did not ascertain that.

Q Did you have any discussion with any fellow officers or FBI agents concerning the idea of securing the room and then going downtown to get a warrant?

A No, sir, I did not.

A L A N D i B O N A, a witness called on behalf of
the government, being first duly sworn, testified as
follows:

DIRECT EXAMINATION

BY MR. SCHATZ:

(45R)

Q Now, sir, had you been told whether any time
element was involved in this case?

A We were told that we had better get moving or
we could possibly miss him.

(46R)

Q Please continue.

A We identified ourselves by saying "FBI", told
them to freeze. They immediately did, and I also recognized
the description that I had been furnished. I recognized
(47R)
that one of the individuals did fit this description
very closely. We identified ourselves. They immediately
turned and ran back into the apartment.

(48R)

Q What did you say?

A "Before we ask you any questions, you must
understand your rights: You got the right to remain
silent; anything you say could be used against you in
court; you have the right to talk to an attorney before
we ask you any questions and to have him with you during
questioning; if you cannot afford a lawyer, one will be

assigned to you before any questioning; if you decide to answer questions now without a lawyer present, you still have the right to stop answering at any time; you also have the right to stop answering at any time until you talk to a lawyer," and they nodded that they understood.

Q Did you observe anything else?

A On a chair, which was maybe 3 feet from this suitcase, thrown over the arms of the chair was clothing. On the top of the bundle of clothing I observed a blue trench coat and a blue corduroy jacket.

Now, I had learned sometime during the investigation (49R) that clothing that fit this type of description had been in the bank robbery. I seized all this evidence.

Q Did you have occasion to go through Government's Exhibits 4 and 5 at any point?

A Yes, when I got back to the office, it is a matter of policy to check pockets to see if there is (50R) anything in them. I did. And in the trench coat in the left-hand pocket I found a nylon stocking mask that had eyeholes and a nose hole in it. In, I believe, the right-hand breast pocket I found a folder with identification of James Nelson in the folder.

(60R)

Q And after I interviewed Mr. Harvey did I interview any of the other defendants?

A Mr. Nelson was then interviewed.

Q And did I read from the first page of the form again setting forth all their rights?

(61R)

A Yes, you did.

Q What did he say he had worn?

A I believe he said a blue corduroy suit, a leisure suit, and blue trenchcoat. And then he stated he didn't want to answer any more questions and wanted to talk to a lawyer.

Q Did I stop interviewing him at that point?

A Yes.

Q Did Mr. Nelson then read over the statement?

A Yes.

Q Did he sign the statement?

(62R)

A Yes.

CROSS EXAMINATION

BY MR. STONE:

(74R)

Q Prior to that day, did you ever receive information from Mr. Harvey before?

A Prior to that day?

Q Yes.

A No.

Q You had never seen him before, had you?

A No.

Q Did you confirm any of the information that he gave the police officers before you went to the Whitehall Hotel?

A No.

(75R)

Q Did you ever check with your own office to see whether James Nelson was a suspect for any bank robbery?

A No.

Q Did you ever check with the Bureau of Criminal Identification in New York City whether James Nelson was a person with a fingerprint sheet or photograph?

A No.

Q When you got off the elevator with that shotgun, was it your intention to arrest the occupant of Room 909?

A Well --

(76R)

Q Yes or no .

A If everything fit -- if there were people in 909, if -- let me give an example. If there were two women in 909, no, I wasn't, because this would not fit who we were looking for.

Q But you knocked on the door, opened the door of 909 to see who was there, is that right?

A Yes.

MR. SCHATZ: Objection, your Honor. What is pertinent is what happened.

THE COURT: Objection sustained.

Q Did you have intention to knock on the room of 909 when you got off the elevator?

MR. SCHATZ: Objection.

THE COURT: Objection sustained. I am not concerned with what he might have done or thought about doing. What we are looking into is what actually occurred.

(89R)

E D W A R D T. W A L K E R, called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHATZ:

Q Now, sir, do you recall who said what to whom
(90R) in substance?

A He was -- the conversation took place at the New York office of the FBI. He was advised of our official

identities, advised we wished to question him concerning the bank robbery charge on which he had been arrested, and he was advised of his rights as set forth on an interrogation-advice-of-rights form which I read to him, which he read, which he stated he understood and which he signed.

Q Did you read him the entire advice-of-rights form?

A Yes, sir.

And he signed it in your presence?

A Yes.

Q Then what happened?

A He stated that he would like to think the matter over before he would answer any questions.

CROSS EXAMINATION

BY MR. STONE:
(96R)

Q Did you inquire as to whether the use of heroin affected his memory?

A No, I did not.

Q Did you inquire as to whether or not the use of heroin made him feel ill at that time?

A He did not indicate that he felt ill.

Q Did you ask him?

A No, I did not ask him.

Q Did you ask him whether the use of heroin was causing any withdrawal symptoms at the time you were conducting the interview?

MR. SCHATZ: Objection, your Honor. Asked and answered.

THE COURT: I will allow it.

A No.
(97R)

Q Prior to the time you questioned him were you advised that a police officer had previously given him his rights and that the defendant indicated he did not want to answer any questions?

A I was advised that he had been advised of his rights by the arresting agents and that he was transported to the 24th Precinct and that he was questioned at the 24th Precinct and that he did not wish to make a statement.

Q Knowing that, you still wanted to question him?
Is that correct?

MR. SCHATZ: Objection, your Honor.

THE COURT: Sustained.

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ROBERT B. FISKE JR.
U.S. ATTORNEY
SO. DIST. OF N.Y.